LEE AH LAN

v.

LEE KIM LAN CONSTRUCTION INDUSTRIES SDN BHD & ANOR

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[CIVIL SUIT NO: 22-107-1996]
5 AUGUST 2002

CIVIL PROCEDURE: *Affidavits - Cross-examination of deponent - Principles - Appointment of solicitor for second defendant challenged by another solicitor - Determination of position - Whether warranted cross-examination of second defendant on her affidavit - Whether warranted cross-examination of both solicitors on their affidavits - Rules of High Court 1980, O. 38 r. 2(3)*

The first defendant herein had applied for leave to cross-examine the second defendant pertaining, firstly, to the latter's summons-in-chambers application to amend her statement of defence ('encl. 110'), and secondly to the affidavits affirmed by the second defendant respecting the appointment of her solicitor. The application was triggered, *inter alia*, by the fact that there were two solicitors on record acting for the second defendant, where one was challenging the proper appointment of the other. Before the learned judge, the issue that arose was whether, upon the proper reading of O. 38 r. 2(3) Rules of the High Court 1980 ('RHC'), the application ought to be allowed by the court.

Held:

[1] Order 38 r. 2(3) of RHC makes it plain that in the event of an application by way of summons-in-chambers, the court hearing the application is given the discretion, pursuant to the application of any party, to order that the deponent attend court for the purposes of cross-examination. However, the Order also provides that the cross-examination is of 'the person making any such affidavit'. The Order having expressed itself to apply to affidavits only, any cross-examination should be confined to the cross-examination on the second defendant's affidavit, and not on her application in encl. 110. (p 594 d-f)

[2] The court's discretion should be exercised with fairness and propriety and leave ought to be granted where the purpose of cross-examination is to determine the truth of the allegations of fact that have been challenged.

However, where there was abundant documentary evidence that was not disputed and the matter could be decided without reference to any cross-examination, no leave would be granted. (p 595 a-b & f)

[3] There is no doubt in the instant case as to the issue of disputed fact pertaining to the appointment of the solicitor in question. There is also no doubt that the challenge pertaining to the truth of the allegation of fact can only be resolved by viva voce evidence, necessitating a resort to cross-examination. That being so, and since there has been no inordinate delay in filing the present application by the first defendant, leave ought to be granted to her to cross-examine on the affidavits. (p 596 a & c)

[4] Since the appointment of the solicitor in question has been seriously challenged, and since two solicitors had affirmed their respective affidavits thereby raising controversies on the same issue of fact, the two solicitors must also attend court to be similarly cross-examined and assist the court in arriving at a definitive determination on the real position. (p 596 d-e)

[Application partly allowed; order accordingly.]

Case(s) referred to:

Abdul Latif Mohamed Ibrahim v. International Factors Leasing Pte Ltd [2001] 2 CLJ 140 CA ***(refd)***

Gomez v. Gomez [1969] 1 MLJ 228 ***(refd)***

Indrani Rajaratnam & Ors v. Fairview Schools Bhd [2002] 1 CLJ 1 CA ***(refd)***

Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors and Another Application [1994] 2 MLJ 789 ***(refd)***

Leisure & Allied Industries Pty Ltd v. Udaria Sdn Bhd [1980] 1 MLJ 189 ***(refd)***

Regional Centre for Arbitration v. Ooi Beng Choo & Anor [1999] 1 CLJ 819 HC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 38 r. 2(3), O. 41 r. 9(1)

For the plaintiff - Cik Mazni; M/s Scully Yoon
For the 1st defendant - S Letchumanan; M/s Letchu Suppiah & Co
For the 2nd defendant - Liza Chan; M/s Liza Chan & Co

Reported by WA Sharif

JUDGMENT

Low Hop Bing J:

Application

This is the first defendant's application in encl. (129) for an order:

1. that the first defendant be given leave to cross-examine Yap Fah (F), second defendant in connection with:

   (a) the application by way of summons-in-chambers dated 10 August 2001 (encl. (110)) to amend second defendant's statement of defence and counterclaim;

   (b) the affidavits affirmed by the second defendant on 9 August 2001, 12 September 2001 and 31 January 2002 in support of encl. (110), especially relating to the appointment of the solicitor Encik Maniam Raju from Tetuan Gunaretnam & Co. of No. 14, Jalan Dato Abdul Rahman, 70000 Seremban ("the solicitor in question");

2. that a hearing including submissions in connection with encl. (110) be stayed until the hearing of the instant application is disposed of; and

3. costs in the cause.

Counsel's Submissions And Court's Decision

Encik S. Letchumanan, learned counsel for first defendant, submitted that this application was made pursuant to O. 38 of the Rules of the High Court 1980, in respect of the determination of a question of fact ie, whether second defendant has indeed appointed the solicitor in question as her solicitor. He added that two solicitors, *viz* Encik Maniam Raju and Cik Indran V. Kamaraguru have affirmed affidavits on 29 August 2001 and 13 September 2001 (exh. CYKl and CYK4 in encl. (119)) which support the statement of the solicitor in question that he has indeed been so appointed, and that this controversy of fact concerning the appointment of the solicitor in question as second defendant's solicitor can only be resolved by way of cross-examination of the second defendant.

Cik Liza Chan, learned counsel for second defendant, in objecting to the instant application, argued that there is delay in making this application, which lacks *bona fide* as it would further prolong the hearing of encl. (110) in particular and the hearing of the entire suit in general. She contended that encl. (110) can be disposed of without the cross-examination of second defendant, and that the affidavits of the aforesaid solicitors *viz*. the solicitor in question and Cik Indran V Kumaraguru have not been filed pursuant to O. 41 r. 9(1) of the Rules of the High Court 1980.

Cik Mazni learned counsel for the plaintiff associated herself with the submission for second defendant in raising a similar objection.

There are of course other detailed submissions from learned counsel from both sides of the Bar table. Apart from commending them for their meticulous masterpieces, I am of the view that the above summary of their respective submissions would adequately assist me in the disposal and determination of the instant application.

The specific provision contained in O. 38 on which the 1st defendant's learned counsel relies in support of the instant application is O. 38 r. 2(3) which, where relevant, is reproduced as follows:

> ... on any application made by summons ..., evidence may be given by affidavit but the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used in evidence without leave of the Court.

A proper perusal of the aforesaid relevant provision in O. 38 r. 2(3) makes it plain and clear to me that in the event of an application by way of summons-in-chambers as in the instant application, the court hearing the application is given the discretion, pursuant to the application of any party, to order that the deponent attend court for the purposes of cross-examination.

It is to be observed that O. 38 r. 2(3) provides for the cross-examination of the person making any such affidavit and such cross-examination should therefore be confined to the cross-examination on second defendant's affidavit and cannot extend to, as has been sought by the first defendant, an order that second defendant be cross-examined on her application in encl. (110). Order 38 r. 2(3) has been clearly expressed to apply to affidavits only and so the court must give legal effect to that provision. That being the case, prayer (a) seeking an order to cross-examine second defendant in connection with her application in encl. (110) is hereby dismissed with costs.

As regards prayer (b) of the instant application, it has long been recognised that O. 38 r. 2(3) confers upon the court the discretion to allow or refuse the cross-examination of a deponent of an affidavit. An examination of cases in which the discretion has been exercised would throw some light as to the principles or guidelines enunciated and applied by our courts.

In *Gomez v. Gomez* [1969] 1 MLJ 228, Raja Azlan Shah, J (now HRH Sultan of Perak) in dealing with an application to cross-examine a priest who was neither a party nor the person making an affidavit, exercised the discretion and made an order allowing the application, as it is fair and proper that the applicant be allowed to cross-examine the priest. The exercise of discretion should therefore be exercised in accordance with fairness and propriety.

In *Leisure & Allied Industries Pty. Ltd. v. Udaria Sdn. Bhd.* [1980] 1 MLJ 189, the defendant having challenged the truth of affidavits sworn by witnesses applied to have the deponents cross-examined. Salleh Abas FJ (sitting as a High Court judge) granted leave for the deponents to be cross-examined, in order to determine the truth of the allegations of fact which have been challenged.

In *Regional Centre for Arbitration v. Ooi Beng Choo & Anor* [1999] 1 CLJ 819, HC the respondent Ooi Beng Choo applied to cross-examine the deponent on the affidavit with regard to the agreement which contained provisions relating to the applicant's privileges and immunities. Nik Hashim J refused leave to cross-examine the deponent as there is no question to be tried, neither were there special circumstances.

In *Abdul Latif bin Mohamed Ibrahim v. International Factors Leasing Pte Ltd* [2001] 2 CLJ 140, the Court of Appeal held that a failure to invoke O. 38 r. 2(3) would result in the inability of the appellant to cross-examine the respondent's solicitors' process server on his affidavit affirming that relevant documents have been served on the appellant.

Where there was abundant documentary evidence that was not disputed and the matter could be decided without reference to any cross-ecamination, no leave to cross-examine would be granted: *Kumagai Gumi Co Ltd v. Zenecon – Kumagai Sdn Bhd & Ors and Another Application* [1994] 2 MLJ 789.

Where there is delay in filing an application to cross-examine a deponent, that delay would defeat the right to cross-examine: *Indrani a/p Rajaratnam & Ors v. Fairview Schools Bhd* [2001] 1 CLJ 1 CA. Here, an oral application to cross-examine was made on 24 January 1995, the second time the petition was adjourned to be heard on its merits. The High Court and the Court of Appeal held that the unexplained delay would be fatal to an application to cross-examine.

Having considered the aforesaid authorities, I shall now proceed the decide on the exercise of my judicial discretion by reference to the facts and circumstances of this case.

There is no doubt as to the issue of disputed fact pertaining to the appointment of the solicitor in question and the challenge pertaining to the truth of allegation of fact can only be resolved by *viva voce* evidence, necessitating a resort to cross-examination.

Secondly, O. 38 r. 2(3) has been invoked by first defendant.

On the issue of delay, the starting point is encl. (110) which prompted first defendant to file the instant application in encl. (129). Enclosure (110) was filed by second defendant on 10 August 2001 while the instant application to cross-examine the deponent in encl. (110) was filed on 19 March 2002. Several affidavits have been filed by all the parties herein between these two dates. In my view there has been no inordinate delay in so far as filing the instant application is concerned. I therefore hold that the first defendant's right is not hereby defeated and that it is fair and proper to grant leave to cross-examine second defendant. Hence I allow prayer (b) of the instant application.

There is another matter which is substantially and closely connected with the instant application. That concerns the affidavits affirmed by the two solicitors in exh. CYK1 and CYK4 in encl. (119). The appointment of the solicitor in question has been seriously disputed and challenged and two solicitors had affirmed the aforesaid affidavits, raising controversies surrounding the same issue of fact. In order to enable these two deponents to present their respective position in a proper perspective, and in line with the fundamental rules of natural justice and to assist me in arriving at a definitive determination on the real position, I hereby make a consequential order that these two solicitors do attend court to be similarly cross-examined on the date of hearing in respect of this disputed fact. Hearing of the suit herein will continue after encl. (129) and subsequently encl. (110) have been disposed of. Save and except for prayer (a) as alluded to above, costs of this application in the cause.